

No. 14-1041 BN

On February 4, 2015, the Board filed a motion for summary decision. Bowen filed her response to the motion on February 23, 2015.

Pursuant to 1 CSR 15-3.446(6)(A),¹ we may decide a motion for summary decision if a party establishes facts that entitle that party to a favorable decision and no party genuinely disputes such facts. Those facts may be established by stipulation, pleading or discovery response of the adverse party, affidavit, or other evidence admissible under the law. 1 CSR 15-3.446(6)(B). As the non-moving party, Bowen had the burden to raise a genuine issue as to any of the essential facts that would otherwise entitle the Board to a favorable decision.

In support of the motion for summary decision, the Board included Bowen's responses to the Board's request for admissions. In response to the motion, Bowen did not raise any genuine issues of fact related to the misconduct for which the Board seeks to impose discipline.

The following facts, based on Bowen's admissions, are undisputed. *See* Rule 59.01(b).

Findings of Fact

1. Bowen is licensed by the Board as a licensed practical nurse (LPN). The license was current and active at all relevant times.

2. On May 28, 2013 and June 17, 2013, Bowen wrote letters to the Board disclosing that she had illegally obtained and used marijuana on February 24, 2014 and that she had been arrested and prosecuted for it in the state of Oklahoma.

3. Marijuana is a controlled substance. Section 195.017.2(4)(w), RSMo Supp. 2013.

4. Bowen had no prescription for marijuana when she used it and never has had one.

Conclusions of Law

We have jurisdiction to hear this case. Sections 335.066.2 and 621.045.² The Board bears the burden of proving that Bowen's license is subject to discipline by a preponderance of the evidence. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App. W.D. 2012)

¹ All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

² Statutory references are to RSMo Supp. 2012 – the statutes in effect at the time of Bowen's conduct -- unless otherwise noted.

(dental licensing board demonstrates “cause” to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

The Board filed this action against Bowen, alleging cause for discipline exists under § 335.066.2(1), (6), and (14), as follows:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use or unlawful possession of any controlled substance, as defined in chapter 195, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

* * *

(6) Violation of, or assisting or enabling any person to violate, any provision of sections 335.011 to 335.096, or of any lawful rule or regulation adopted pursuant to sections 335.011 to 335.096;

* * *

(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

In her response to the Board’s motion for summary decision, Bowen continues to allege that the Board’s complaint in this case is barred under the doctrine of *res judicata*, a proposition that we took up and ruled upon in November in reference to her motion to dismiss. We see no reason to revisit the ruling here. In addition to that argument, Bowen attacks the Board’s motion on procedural grounds, stating that our summary decision regulation requires the moving party to adhere to Supreme Court Rule 74.04. However, 1 CSR 15-3.446(6)(B) provides only that a

party “*may* meet the requirements for the content of a motion, or for a response to a motion, under section (6) of this rule by complying” with that Rule. It is merely advisory and not compulsory.

Bowen argues that the Board has not alleged undisputed facts sufficient to show a violation under subsection (1) of the disciplinary statute because there is no evidence that Bowen used marijuana to the extent that it impaired her ability to perform the functions and duties of a nurse. However, the statute does not say that— it says that a nurse’s license is subject to discipline if the nurse either uses or unlawfully possesses a controlled substance, *or* uses an alcoholic beverage to an extent that such use impairs a person’s ability to perform the work of [a nurse].” A statute should be read to effect the intent of the legislature, starting with the plain language used, *United Pharmacal Co. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 909-911 (Mo. banc 2006); to give effect to all words and phrases, *Koetting v. State Bd. of Nursing*, 314 S.W.3d 812, 820 (Mo. App., W.D. 2010); and to reject an interpretation that would cause a part of the statute to be ignored, *id.*

A proper application of § 335.066.2(1) gives effect to all the words in the statute without producing an unintended interpretation. Under our reading, unlawful possession of a controlled substance is cause to discipline a nurse, as is use of either alcohol or a controlled substance to the extent that such use impairs the nurse’s ability to perform the work of his or her profession. Therefore, Bowen is subject to discipline because when she possessed marijuana without having a prescription for it, she did so unlawfully pursuant to § 195.010(34) (“A person has actual possession if he has the [controlled] substance on his person or within easy reach and convenient control”), § 195.202.1 (“Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance”) and § 195.180, RSMo 2000 (“A person may lawfully possess or have under his control a controlled substance if such

person obtained the controlled substance directly from, or pursuant to, a valid prescription or order of a practitioner”). Such unlawful possession is cause for discipline under § 335.066.2(1). For the same reasons, Bowen is also subject to discipline under § 335.066.2(14).

We are aware that subsections (1) and (14) of § 335.066.2 overlap to a degree, inasmuch as the latter provides for discipline of a licensee who violates “the drug laws or rules or regulations” of this or any state, or the federal government. But our construction of subsection (1) does not render subsection (14) superfluous. Subsection (1) addresses violations of Chapter 195 as well as impairment caused by consumption of alcohol. Subsection (14) goes further, covering not only Missouri laws contained in Chapter 195, but Missouri laws that may be contained in other chapters of the Revised Statutes; Missouri rules and regulations; and the rules, regulations, and laws of any other state (including the state of Oklahoma where Bowen was prosecuted for possession) or the federal government.

Finally, Bowen argues that the Board has failed to establish facts to support the contention that there is cause to discipline Bowen’s license under subsection (6) for violation of any provision of the Nurse Practice Act. In support of its motion, the Board alleges only that Bowen admitted cause under the provision in her responses to the request for admissions. But the Board did not include a request that Bowen specifically admit cause for discipline under any of the provisions of the disciplinary statute, and it did not tell us how the facts Bowen did admit are grounds for discipline under subsection (6). The Board has failed to carry its burden with respect to proving cause for discipline exists pursuant to § 335.066.2(6).

The Board has demonstrated cause for discipline under § 335.066.2(1) and (14).

Bowen’s Rationale

The explanation for her marijuana use that Bowen sets forth in the letters she authenticated as her writings in response to the request for admissions is that she has a

complicated medical history and lives with intractable pain. Even as the opinions and legal landscape involving medical use of marijuana have changed in recent years, this Commission has no authority to disregard the current law in Missouri. *See Lynn v. Director of Revenue*, 689 S.W.2d 45, 49 (Mo. banc 1985). Bowen acknowledges that her physical condition precipitated a brief lapse in judgment; however, that information is for the Board to consider when it determines the appropriate degree of discipline. Section 335.066.3. In a case such as this one, our role is only to decide whether cause for discipline exists. Section 621.110, RSMo 2000.

Summary

We grant the Board's motion for summary decision and cancel the hearing. The motion to quash subpoena filed by Petitioner on this date is moot.

SO ORDERED on March 12, 2015.

s/s Nicole Colbert-Botchway
NICOLE COLBERT-BOTCHWAY
Commissioner